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In The

Supreme Court of the United States

October Term, 1997

PALM BEACH SOIL AND WATER CONSERVATION DISTRICT, a political subdivision of the State of Florida,

Petitioner,

vs.

MARK BLEDSOE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD H. McDUFF
Counsel of Record
JILL S. BILANCHONE
JOHNSON, ANSELMO, MURDOCH, BURKE & GEORGE, P.A.
Attorneys for Petitioner
790 East Broward Boulevard
Suite 400
Fort Lauderdale, Florida 33301
(954) 463-0100

146747
(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS
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QUESTION PRESENTED FOR REVIEW

I. Does Title II of the ADA provide a claim for relief for employment discrimination by public entities of any size, despite:

A. the clear statutory language and framework of the ADA which indicates that Title I of the ADA applies to employment discrimination exclusively?

B. numerous incongruities which result from interpreting Title II to cover employment discrimination based on disability?

C. other indicia of Congress that Title I of the ADA is the exclusive remedy for employment discrimination based on disability?

LIST OF PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed here include those who appear in the caption of the case. There is no parent or subsidiary of any party to be listed.

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Petitioner, Palm Beach Soil and Water Conservation District, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") is reported at 133 F.3d 816 (11th Cir. 1998) and is reproduced in the Appendix filed herewith ("App. A") at 1a. The opinion of the district court is reported at 942 F. Supp. 1439 (S.D. Fla. 1996) and is reproduced at App. C at 23a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1998. The Court of Appeals denied a timely Suggestion of Rehearing *En Banc* on March 25, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of Titles I and II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111, *et seq.*, and 12131, *et seq.*, respectively ("ADA"), are set forth in the Appendix filed herewith: 42 U.S.C. §§ 12111(2),(5)(A), & (8), 12112(a), 12117(a), 12131(2), 12132 and 12133.

STATEMENT OF THE CASE

The facts of the case and the procedural background are as set forth in the opinion of the Court of Appeals:

I. Facts

> Mark Bledsoe ("Bledsoe") was employed as a Resource Technician for the Palm Beach Soil and Water Conservation District ("District") from January 1988 until his termination in October of 1992. The position required that Bledsoe spend a significant portion of his time walking, surveying, and performing manual labor in the fields. On February 26, 1990, while performing his duties, Bledsoe sustained an injury to his left knee for which he made a claim for workers' compensation benefits. Upon medical advice that he should avoid excessive walking and walking on uneven terrain, Bledsoe requested some form of accommodation from his supervisor. In response to his request, the District offered Bledsoe the position of Resource Conservationist, allowing him to write his own job description; he rejected the offer. In October 1992, the District terminated Bledsoe's employment. Subsequent to his separation of employment, Bledsoe settled his worker's compensation case and signed a joint settlement agreement.[1]

II. Procedural Background

Bledsoe brought this action under Title II of the ADA, 42 U.S.C. § 12131 *et seq.*, and the

1. The Court of Appeals' determination regarding whether the release signed when settling the workers' compensation case precluded Bledsoe from bringing an action under the ADA is not material to the questions presented in this case.

Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, as amended by the Civil Rights of 1991, alleging that he was disabled within the meaning of the ADA, that the District failed to reasonably accommodate his disability and that the District discharged him as a result of his disability.[2] The District moved for summary judgment, arguing in part that Bledsoe's employment discrimination claim was not cognizable under Title II of the ADA. Thereafter, the Southern District of Florida entered summary judgment for the District on the ADA claim on the basis that Title II did not apply to employment and that the District did not fall within the purview of Title I, since it employed less than fifteen employees at all material times. Bledsoe appealed the district court's grant of summary judgment. On January 22, 1998, the Eleventh Circuit Court of Appeals reversed the district court's grant of summary judgment, holding that Title II does encompass a cause of action for employment discrimination. The District filed its Suggestion for Rehearing *En Banc*. On March 25, 1998, the Court of Appeals entered an order denying the District's Petition for Rehearing and Suggestion of Rehearing *En Banc per curiam*.

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2. The original complaint named both the District and Palm Beach County as defendants and sought relief under Title I of the ADA. However, the District does not fall within the purview of Title I because it does not employ fifteen or more employees. *See* 42 U.S.C. § 12111(5)(A). The District and Palm Beach County moved for summary judgment on various issues, including, the inapplicability of Title I to the District. On July 27, 1995, the district court entered an Omnibus Order granting summary judgment for Palm Beach County on the basis that it was not Bledsoe's employer and for the District on the ADA claim on the basis that the District did not fall within the purview of Title I. On January 4, 1996, Bledsoe filed his First Amended Complaint to seek relief under Title II of the ADA and the Rehabilitation Act.

REASONS FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Eleventh Circuit has decided important questions of federal law concerning whether Title II of the ADA covers public employment discrimination, ones which should be, but have not been, decided by this Court, i.e.:

- **Whether Title II of the ADA applies to public employment discrimination despite the clear text and statutory framework of the ADA which indicates that Title I of the ADA is the exclusive remedy for employment discrimination based on disability?**

- **Whether Title II of the ADA applies to public employment discrimination despite numerous incongruities which result from a contrary reading?**

- **Whether Title II of the ADA applies to public employment discrimination despite other indicia of Congress that Title I of the ADA is the exclusive remedy for employment discrimination based on disability?**

The Court should grant the petition for a writ of certiorari and should decide whether Title II applies to public employment discrimination. That question has not been, but should be, settled by this Court.

Similar to other courts that have interpreted the scope of Title II of the ADA without thorough analysis, the Eleventh Circuit Court of Appeals' opinion raises, and resolves, the following issue adversely to Defendant: does Title II of the ADA provide a claim for relief for employment discrimination by public entities of any size.

Admittedly, the majority of federal district courts have taken the view that Title II of the ADA covers a public entity's employment practices.[3] The opinions of the various district courts were based, in large part, upon the federal regulations promulgated by the Department of Justice ("DOJ") contained within 28 C.F.R. § 35.140 (1996), as mandated by 42 U.S.C. § 12134.

The Eleventh Circuit Court of Appeals relied primarily on its review of the statutory language of Title II, the DOJ's regulations, and other court's resolution of the issue to determine that the ADA encompasses public employment discrimination in this case.[4] 133 F.3d at 819; App. A at 8a. Careful scrutiny of the ADA, however, mandates a contrary conclusion.

The Americans with Disabilities Act as enacted on July 26, 1990, contains four subchapters. Subchapter I (Title I) is entitled "EMPLOYMENT"; Subchapter II (Title II) is entitled "PUBLIC

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3. *See, e.g., Wagner v. Texas A & M Univ.*, 939 F. Supp. 1297, 1309-10 (S.D. Tex. 1996); *Graboski v. Guiliani*, 937 F. Supp. 258, 269 (S.D.N.Y. 1996), *aff'd, Castellano v. City of New York*, __ F.3d __, 1998 WL 91216 (2nd Cir. Feb. 24, 1998); *Silk v. City of Chicago*, 1996 WL 312074 *10 (N.D. Ill. 1996); *Bruton v. Southeastern Pennsylvania Transp. Authority*, 1994 WL 470277, *2 (E.D. Pa. 1994); *Ethridge v. State of Alabama*, 847 F. Supp. 903, 905 (M.D. Ala. 1993); *Eisfelder v. Michigan Dept. of Natural Resources*, 847 F. Supp. 78 (W.D. Mich. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215 (S.D.N.Y. 1993); *Petersen v. University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wis. 1993); and *Bell v. Retirement Bd. of The Firemen's Annuity & Benefit Fund of Chicago*, 1993 WL 398612, *4 (N.D. Ill. 1993).

4. Prior to its decision in this case, the Court of Appeals has, in *dicta*, made the assumption that Title II of the ADA applies to public employment discrimination. *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996).

SERVICES"; Subchapter III (Title III) is entitled "PUBLIC ACCOMMODATIONS"; and Subchapter IV is entitled "MISCELLANEOUS PROVISIONS." Titles I and II are the only subchapters at issue in this case, and they are located at 42 U.S.C. §§ 12111, *et seq.*, and 12131, *et seq.*, respectively. 42 U.S.C. § 12112(a) of Title I provides as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The term "covered entity" means, *inter alia*, an employer. An employer is defined as:

> . . . a person engaged in an industry affecting commerce who has 15 or more employees for each working day, and each of 20 or more calendar weeks in the current or preceding calendar year. . . .

42 U.S.C. §§ 12111(2) & (5)(A). Local and state governmental entities are "covered entities" under the meaning of the ADA, and thus, subject to suit. *See, e.g., Bodiford v. State of Alabama*, 854 F. Supp. 886 (M.D. Ala. 1994).

The discrimination prohibited by Title II is, by definition, quite different than that provided in Title I. 42 U.S.C. § 12132 provides:

> Subject to the provisions of the subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

> denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Nowhere in Title II are the terms "covered entity" or "employer" used. Furthermore, the definition of a "qualified individual with a disability" in Title II differs significantly from the definition contained within Title I.

Under Title I, the term "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Under Title II, the term "qualified individual with a disability" is defined without *any* reference to employment as:

> . . . an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the *receipt* of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (emphasis supplied).

To determine the respective meanings of Title I and Title II, the analysis must begin with the language of the statute. *Bread Political Action Committee v. Federal Election Comm.*, 455 U.S. 577, 580 (1982) (in the absence of a clearly expressed legislative intention to the contrary, the plain language of the statute controls its construction). Further analysis requires the court to look to the "design of the statute as a whole and to its object

and policy." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (in ascertaining the meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole).

An examination of the statutory language and the design of the statute inevitably lead to the logical conclusion that Title I ("EMPLOYMENT") was specifically and exclusively enacted to address matters of employment, *i.e.*, inputs. Title II was enacted specifically to address the receipt of public services, *i.e.*, outputs. *See Iskander v. Rodeo Sanitary District*, 1995 WL 56578 (N.D. Cal. 1995), *aff'd on other grounds*, 121 F.3d 715 (9th Cir. 1997) (unpublished decision) (plaintiff misconstrued Title II of ADA because Title II applied to rendering of services to public by public entities, *i.e.*, public transportation, and did not apply to the defendant's composition of employees). A plain reading of the statute certainly does not reveal that Title II includes a prohibition against employment discrimination by public entities. *See Ethridge v. State of Alabama*, 847 F. Supp. at 905; *Silk v. City of Chicago*, 1996 WL 312074, *10; *Petersen v. University of Wisconsin Bd. of Regents*, 818 F. Supp. at 1278.

Many incongruities arise from holding that public entities may be sued for employment discrimination under either Title I or Title II.[5] The first incongruity that arises is that an entity that would not be considered to be an "employer" for purposes of Title I could be considered to be an "employer" for purposes of suit under Title II; it is only logical that one sues his or her

5. As a preliminary matter, such a holding renders Title I redundant insofar as it applies to public entities with fifteen or more employees. This reading of the ADA violates the rule of statutory construction that no provision of a statute should be construed to be redundant. *Kungys v. United States*, 485 U.S. 759, 778 (1988).

"employer" for acts of employment discrimination. However, nowhere in Title I does Congress state that the fifteen employee threshold is inapplicable to actions against public employers.

A second incongruity that arises involves a plaintiff who meets the jurisdictional requirements of Titles I and II. Such plaintiff will be subjected to different standards for determining whether he or she is a "qualified individual with a disability," depending upon which Title is applied.[6] Further, if a plaintiff is employed by a public entity with less than fifteen employees, then he or she will be subjected to a different standard than a plaintiff employed by a public entity with fifteen or more employees who chooses to pursue his or her claim under Title I. The disparity in these results coupled with the plain meaning of the ADA, provide further indicia of Congress' intent that only Title I encompasses employment discrimination claims.

A third incongruity that arises is that such interpretation vitiates the administrative exhaustion requirements contained within Title I, insofar as public entities and their employees are concerned. Title I incorporates the procedures of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) and (f)(1) ("Title VII"), which require aggrieved employees to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") before filing suit in federal court. The adoption of these procedures is set forth in 42 U.S.C. § 12117(a). Title II, however, adopts the remedies, procedures, and rights of the Rehabilitation Act of 1973, 29 U.S.C. § 794a, which does not require the exhaustion of administrative remedies. The end result is that an employee of a public employer, which meets the threshold requirements under Title

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6. The DOJ promulgated regulations which ignore the express definition of a "qualified individual with a disability" in Title II, and avoid this nonsensical result by referring to Title I substantive standards in cases that are also subject to the jurisdiction of Title I. 28 C.F.R. § 35.140.

I, may disregard and avoid the EEOC exhaustion requirement by simply suing under Title II of the ADA.[7] Indeed, in the State of Florida, such public employee will have four years to file a judicial complaint of disability-based discrimination under Title II.[8]

Although the courts in *Petersen v. University of Wisconsin Bd. of Regents*, *supra* and *Wagner v. Texas A&M University*, *supra*, and the Court of Appeals in this case, have explicitly or implicitly held that this result is permissible, the net effect is to render the plain language outcome of a Congressional act meaningless where public entities are concerned. As the district court in this case articulately stated:

> [T]he statute the majority of the district courts (and the Justice Department) give us is completely bewildering: both Title I and Title II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employees to be sued for employment discrimination, but you can get around

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7. Indeed, the Eleventh Circuit Court of Appeals has held that no separate cause of action exists under 42 U.S.C. § 1983 for violations of the ADA or Rehabilitation Act based, in part, on the anomaly created by allowing a plaintiff to sue under Section 1983 and circumvent the administrative process of the ADA. *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530-31 (11th Cir. 1997).

8. The Eleventh Circuit Court of Appeals has recently held that each state's respective statute of limitations for personal injury actions applies to Title II of the ADA, since Title II does not contain any limitations period. *Everett v. Cobb County School District et al.*, 138 F.3d 1407, 1409 (11th Cir. 1998) (applying Georgia two-year statute of limitations to Title II ADA claim). Florida's statute of limitations for negligence actions is four years. Fla. Stat. § 95.11(3).

> this under Title II if your employer is an arm of the State; and Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times.

942 F. Supp. 1439, 1445-46 (S.D. Fla. 1996); App. C at 35a-36a.

A fourth incongruity that may arise from holding that Title I and Title II overlap in the area of public employment is that a different measure of damages may apply. Pursuant to 28 C.F.R. § 35.140(b)(1)[9], the requirements of Title I of the Act (as established by the EEOC) apply to employment in any service, program or activity conducted by a public entity under Title II if that public entity is also subject to the jurisdiction of Title I. Title I of the ADA specifically adopts the damage remedies provided under Title VII; whereas, Title II adopts the rights and remedies of the Rehabilitation Act of 1973, which adopts the rights and remedies set forth in Title VI, 42 U.S.C. § 2000d, *et seq.* *See* 42 U.S.C. § 12117; 42 U.S.C. § 12134; 29 U.S.C. § 794a. The standard under Title VI appears to be "any appropriate relief."

The 1991 Amendments to the Civil Rights Act of 1994 make clear that intangible damages for mental anguish are recoverable under Title VII, the standard that is applied under Title I of the ADA. 42 U.S.C. § 1981a. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996). Under Title II, however, it is unclear whether the same damages are available because of the statute's reference to the Rehabilitation Act of 1973. *See, e.g., Tyler v. City of Manhattan*, 849 F. Supp.

9. This regulation, among others, was promulgated by the Department of Justice to carry out the provisions of Title II.

1442, 1443 (D. Kan. 1994), *order aff'd*, 118 F.3d 1400 (10th Cir. 1997); *Shuttleworth v. Broward County*, 649 F. Supp. 35, 36-38 (S.D. Fla. 1986). *But see Waldrop v. Southern Co. Services, Inc.*, 24 F.3d 152 (11th Cir. 1994) (citing *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992)) (full spectrum of remedies under Rehabilitation Act of 1973).[10]

Another damage related incongruity that arises from interpreting Title II to encompass employment discrimination is found by examining 42 U.S.C. § 1981a(b)(3), which limits damages for mental anguish based upon the size of the employer. The provision sets a maximum award against employers of fifteen or more employees at $50,000, and up to $300,000 against an employer of more than 500 persons. The subpart applies only to Title I of the ADA. 42 U.S.C. § 1981a(a)(1). Does this mean that under Title II of the ADA a public employer of four persons would be subjected to unlimited damages for mental anguish for disability discrimination because the limitation only applies to suits under Title I, when an employer of 501 persons is only subjected to $300,000? The obvious answer is no. The limitations set forth in Section 1981a illustrate that only employers of fifteen or more persons are subject to employment discrimination suits, as a result of a Congressional balancing of interests, discussed *infra*.

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10. This Court has not specifically determined what damages are available under Title VI for intentional discrimination. *Cf. Guardians Assn. v. Civil Serv. Comm'n. of the City of New York*, 463 U.S. 582 (1982) (finding compensatory damages not recoverable for unintentional discrimination under Title VI). It has generally been recognized, however, that Title IX is patterned after Title VI and "analysis of the two statutes is substantially the same." *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 619 (11th Cir. 1990). The legislative history of Section 504 of the Rehabilitation Act also reflects that Congress explicitly patterned Section 504 after Title VI. *See* S. Rep. No. 1297, 93d Cong., 2d Sess. at 39-40, *reprinted in*, 1974 U.S.C.C.A.N. 6373, 6390.

By way of example, assume that Employee A is employed by a public entity with fifteen employees, and Employee B is employed by a public entity with fourteen employees. Both A and B have the same disability and are subjected to the exact same act of discrimination. Employee A could sue under Title II of the ADA when he is covered by Title I, but obtain damages allowed under Title VII based upon 28 C.F.R. § 35.140(b)(1). Employee B could only sue under Title II of the ADA, and may be entitled to much greater or different damages because of the unclear standard under Title VI of the Civil Rights Act of 1964. As well, Employee A could file suit against his employer without first filing a charge of discrimination with the EEOC, and Employee B would be able to sue his employer under Title II when the employer would not meet the definition of "an employer" under Title I. All the while, the same employees, A and B, of a private employer would not be treated in the same manner. The end result is absurd.

In determining that Title II of the ADA applies to public employment discrimination, the Eleventh Circuit Court of Appeals relied in substantial part on the Department of Justice's regulations providing that Title II prohibits discrimination by public entities as set forth in 28 C.F.R. § 35.140(a). 133 F.3d at 821; App. A at 12a. However, the regulations are awkward and in clear contravention of the ADA. Admittedly, it is the general rule that "considerable weight should be accorded to an executive department's construction of the statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984). Notwithstanding, the judiciary is the final authority when dealing with statutory construction, and the court must reject executive agency constructions of the statute which are clearly contrary to congressional intent. *Id.* at 843 n.9.

When a court engages in a review of an executive department's construction of a statute which it has been

designated to administer, the court must make two inquiries. The first is whether Congress has directly and clearly spoken on a particular matter. *Id.* at 842. The second question that must be answered, if the court determines that Congress has not directly and clearly addressed a particular issue, is to determine whether the executive agency's interpretation is a permissible construction of the statute. *Id.* at 843.

In the instant case, the answers to both of these questions militate against the interpretation offered by the Eleventh Circuit Court of Appeals and other district courts. First, Congress has directly spoken to the issue at hand. It has clearly and unequivocally stated that employment discrimination on the basis of disability is to be remedied under Title I of the ADA, with a minimum coverage of fifteen employees before being subject to the Act. Title II, which is mutually exclusive of Title I, deals with the receipt of public services, such as public transportation; therefore, the court need go no further because any administrative agency interpretation to the contrary is clearly contrary to the clear language of the statute. *See also Demarest v. Manspeaker*, 498 U.S. 184 (1991) (administrative interpretation of a statute contrary to plain language of the statute is not entitled to deference).

In determining that Title II of the ADA encompasses public employment discrimination, the Eleventh Circuit Court of Appeals also suggests that Congress legislated the ADA against the backdrop of *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). 133 F.3d at 821; App. A at 10a-11a. *Darrone* stands for the proposition that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination and employment against handicapped individuals by recipients of federal financial assistance.

Contrary to the Rehabilitation Act, however, Congress in enacting the ADA, set up a more comprehensive and detailed

statutory scheme after seventeen years had passed.[11] As previously stated, Congress formulated three separate and distinct titles to the ADA; each one being mutually exclusive of the other. The fact that each section is mutually exclusive of the other, and that the clear language of Title I exclusively deals with employment discrimination, is further illustrated by reference to other acts of Congress.

The first point of reference is 29 U.S.C. § 794(d) (1992), which clearly and unequivocally states that the standards used to determine whether the Rehabilitation Act has been violated in terms of employment discrimination must be the same standard applied under Title I of the ADA. Nowhere in the Rehabilitation Act, as amended in 1992, is any mention made to Title II of the ADA when dealing with employment discrimination.

The second point of reference is the 1991 amendments to the Civil Rights Act of 1964, as found at 42 U.S.C. § 1981a(a)(2). Section 1981a is entitled: **"Damages In Cases of Intentional Discrimination In Employment."** Subsection (a)(2) provides that persons intentionally discriminated against by employers on the basis of disability are entitled to recover, among other things, compensatory damages under Title I of the ADA. As well, Section 1981a provides for a jury trial to a person seeking damages against an employer under Title I of the ADA. Again, no reference is made to Title II of the ADA. These two statutes reinforce the fact that Congress clearly and unequivocally desired that Title I of the ADA was the exclusive remedy for employment discrimination based on disability.

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11. In fact, Congress in enacting the Rehabilitation Act of 1973 set forth a threshold requirement that prevented the Act from being applicable to all employers, *i.e.*, the receipt of federal financial assistance. Therefore, the establishment of minimum criteria or thresholds is not a foreign concept to Congress.

A third point of reference is that the definition of an "employer" in Title I of the ADA mirrors the definition of employer in other federal anti-discrimination statutes pertaining to employment, specifically, Title VII and the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"). Courts have recognized that Title VII, the ADEA and the ADA "share a common structure in furtherance of a common purpose." *Stephens v. Kay Management Co., Inc.*, 907 F. Supp. 169, 172 (E.D. Va. 1995). As one court explained:

> [T]hese threshold requirements [of a minimum number of employees] reflect in each statute a balance, struck by Congress, between the goals of eradicating discrimination and protecting small enterprises from the hardship of litigating discrimination lawsuits.

Id. at 172. *Cf. Oscar Mayer & Co. v. W. Evans*, 441 U.S. 750, 755 (1979) (recognizing that the ADEA and Title VII share a common purpose in eliminating discrimination in the work place); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

Thus, to conclude that Title II covers employment discrimination, the Court must find that disabled employees of public entities are entitled to a protected status paramount to that of gender, age, race, religion and national origin. Such a result cannot obtain because all are groups that have historically been subjected to discrimination.[12]

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12. The Eleventh Circuit Court of Appeals relied, in part, on the legislative commentary or reports of committees of Congress to determine that Title II of the ADA encompasses public employment discrimination. 133 F.3d at 820; App. A at 9a-10a. However, any reference to commentary or reports of committees of Congress are inapposite. Courts have no authority to enforce a principal gleaned from legislative history that it has no statutory point of reference. *Shannon v. United States*, 512 U.S. 573 (1994). Additionally, courts should not resort to (Cont'd)

In summary, the Eleventh Circuit Court of Appeals has raised important questions about federal law and has answered those questions adversely to public employer defendants without reliance on the clear text and statutory framework of the ADA. These issues, which go to the heart of federal laws regarding disability-based discrimination in employment and Congressional balancing of interests in anti-discrimination statutes, should be answered by this Court. Thus, the Court should issue the writ.

CONCLUSION

Based upon the authorities and the argument presented, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

RICHARD H. McDUFF
Counsel of Record
JILL S. BILANCHONE
JOHNSON, ANSELMO, MURDOCH,
BURKE & GEORGE, P.A.
Attorneys for Petitioner
790 East Broward Boulevard
Suite 400
Fort Lauderdale, Florida 33301
(954) 463-0100

(Cont'd)
legislative history when a statutory text is clear. *Ratzlaf v. United States*, 510 U.S. 135 (1994). It is also a rule of law that congressional committee reports do not bear the force of law. *United States v. Thigpen*, 4 F.3d 1573 (11th Cir. 1993), *cert. denied*, 512 U.S. 1238 (1994). Again, in the instant case, the statute is clear and unambiguous as to claims for employment discrimination, and the legislative history, at best, is ambiguous and confusing; therefore, no deference should be given to the legislative commentary and reports.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 22, 1998

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5375

District Court No. 94-8360CV-KLR

MARK BLEDSOE,

Plaintiff-Appellant,

versus

PALM BEACH COUNTY SOIL AND WATER CONSERVATION DISTRICT,

Defendant-Appellee,

BOARD OF COUNTY COMMISSIONERS FOR PALM BEACH COUNTY,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(January 22, 1998)

Before DUBINIA and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge

Appendix A

DUBINIA, Circuit Judge:

Appellant, Mark Bledsoe ("Bledsoe") appeals the district court's grant of summary judgment to the Palm Beach County Soil and Water Conservation District ("District"), on Bledsoe's claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. Section 12131 ("Title II") and the Rehabilitation Act, 29 U.S.C. Section 701, *et seq.* This case involves an issue of first impression in our circuit: whether Title 11 of the ADA encompasses employment discrimination. We answer the question in the affirmative and, accordingly, we reverse the district court's grant of summary judgment and remand this case for further proceedings consistent with this opinion.

I. *BACKGROUND*

Bledsoe was employed as a Resource Technician for the District from January 1988 until his termination in October of 1992. In his employment, Bledsoe had to spend a large portion of his time walking, surveying, and performing manual labor in the fields. While performing his duties, on February 26, 1990, Bledsoe sustained an injury to his knee for which he made a claim for workers' compensation benefits. Based on the advice of his doctors that he should refrain from excessive walking and walking on uneven terrain, Bledsoe requested some form of accommodation from his supervisor. In response, the District offered Bledsoe the position of Resource Conservationist, but he rejected the offer. In October 1992, the District terminated Bledsoe.

Subsequent to his termination, Bledsoe settled his workers' compensation case with Palm Beach County.[1] The joint settlement

1. At all relevant times, the District was Bledsoe's employer; however, because the District had no more than five employees at a time, it participated in (Cont'd)

agreement entered into by the parties contained the following partial release provision:

> As further consideration for the aforementioned payment, the Employee/Claimant agrees and does hereby release, discharge, and surrender any and all claims, whether or not asserted, against the Employer/ Carrier or Servicing Agent, or any of its officers, agents, servants, employees, directors, successors, assigns, and any other person or entity so connected to the Employer/Carrier or Servicing Agent, of any nature whatsoever, excepting only (1) future medical pursuant to other provisions of this agreement, or (2) penalties, interest or attorneys' fees which might be due because of failure to pay order approving this Joint Petition within 30 days.

R1-34-Exh. A.

Bledsoe filed suit on June 24, 1994, against the District and Palm Beach County alleging that both of those entities were his "employer" within the meaning of Title I of the ADA and the Rehabilitation Act and had violated his rights protected by those acts. Specifically, Bledsoe alleged that he had a disability within the meaning of the law, that the defendants had failed to accommodate his disability, and that the defendants discharged him as a result of his disability. Palm Beach County filed a motion

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(Cont'd)

Palm Beach County's insurance plans, including its workers' compensation plan. For a fee, the County adjusted workers' compensation claims made against the District. Therefore, Palm Beach County was the District's workers' compensation carrier and the party with whom Bledsoe settled his workers' compensation claim.

to dismiss arguing that it was not Bledsoe's "employer" for purposes of the claims and that it had been released from the claims by virtue of Bledsoe's partial release of his workers' compensation benefits. After consideration, the district court determined that Palm Beach County was not Bledsoe's employer and, therefore, summary judgment should be entered for it on all claims. Bledsoe has not appealed the district court's disposition that the County was not his employer.

The litigation continued against the District. Because the District alone did not have the requisite number of employees to effect coverage under Title I of the ADA,[2] Bledsoe sought leave to amend the complaint to bring his claim under Title II, and the district court granted leave. The District filed a motion for summary judgment arguing first that Title II of the ADA does not apply to discrimination in employment and, second, that the partial release in Bledsoe's joint settlement agreement with the County released his claims against the District. Bledsoe opposed the motion. The district court entered summary judgment for the District on both Bledsoe's ADA and Rehabilitation Act claims. Bledsoe then perfected this appeal.

II. *DISCUSSION*

Bledsoe raises two issues for our review: (1) whether the district court properly concluded that the workers' compensation release bars Bledsoe's federal claims of employment discrimination; and (2) whether the district court properly determined that Title II of the ADA does not apply to

2. The term "employer" in Title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . ." 42 U.S.C. § 12111(5).

discrimination in employment. We review the district courts order granting summary judgment *de novo. Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 612 (11th Cir. 1995). After conducting our review, we conclude that the district court improperly found that the workers' compensation release barred Bledsoe's federal claims of employment discrimination and that Title II does not encompass employment discrimination.

A. *Workers' Compensation Release*

In its determination that the workers' compensation release barred Bledsoe's ADA and Rehabilitation Act claims, the district court relied on *F.M. v. Palm Beach County*, 912 F.Supp. 514 (S.D. Fla. 1995), *aff'd F.M. v. County Comm'rs*, 84 F.3d 438 (11th Cir. 1996)(Table). On appeal, Bledsoe contends that the district court erred in relying on *F.M. v. Palm Beach County*. He argues that the issue should have been analyzed under this circuit's decision in *Puentes v. United Parcel Service, Inc.*, 86 F.3d 196 (11th Cir. 1996). Bledsoe is correct.

The Supreme Court has stated that an employee can waive his "cause of action under Title VII as part of a voluntary settlement agreement" if "the employee's consent to the settlement was voluntary and knowing." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52, n. 15 (1974). The same principles should be equally applicable to waiver of rights under Title II of the ADA. *See Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9 (1st Cir. 1997). The waiver of such remedial rights, however, "must be closely scrutinized," and a court must look to the totality of the circumstances to determine whether the release is knowing and voluntary. *Puentes v. United Parcel Service*, 86 F.3d at 198.

In *Puentes*, the plaintiffs, at the time of their terminations, were offered substantial severance packages and the ability to

resign "for personal reasons" on the condition that they execute unambiguous release agreements waiving all employment discrimination claims arising out of their terminations. Both plaintiffs executed the agreements, but later filed suit against UPS alleging racial and national origin discrimination. UPS moved for summary judgment, which the district court granted. On appeal, this court reversed, concluding that a jury should decide whether the releases were knowingly and voluntarily executed.

The *Puentes* court explained that the following factors bear on whether a release is knowing and voluntary:

> the plaintiffs education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.

86 F.3d at 198 (*quoting Beadle v. City of Tampa,* 42 F.3d 633, 635 (11th Cir.), *cert. denied,* 515 U.S. 1152 (1995)). When reviewing these factors in *Puentes,* the court determined that the plaintiffs did not have sufficient time to consider their release agreements and neither plaintiff had consulted with an attorney. The court also noted that neither plaintiff had any role in deciding the terms of the agreement; the plaintiffs were simply handed printed forms. 86 F.3d at 199. These factors raised a genuine issue of material fact as to whether plaintiffs voluntarily and knowingly executed the release agreements. Accordingly, the issue could not be resolved by summary judgment.

The factors set forth in *Puentes* should have been considered by the district court in this case. The district court should not have summarily adopted a decision from another case, even though it dealt with the exact same release form. Each factor should be independently analyzed. In applying the *Puentes* factors, we conclude that a jury question exists about whether Bledsoe voluntarily and knowingly released ADA and Rehabilitation Act claims. The language of the release indicates that Bledsoe was only settling his claim for wage loss benefits under the workers' compensation law. There is nothing in the release that suggests or mentions a waiver of federal discrimination claims. Additionally, there was no evidence in the record of any consideration given to Bledsoe in exchange for his allegedly waiving his rights under the ADA and the Rehabilitation Act. Moreover, Bledsoe and his counsel provided affidavits to the district court stating that the only matters released were benefits for wage loss available under the workers' compensation law, thus creating an issue of fact as to what was released. The district court erred in granting summary judgment on this claim.

B. *Title II of the ADA*

The district court held that Title II of the ADA does not encompass employment discrimination. Bledsoe[3] urges this court to reverse and join several other courts which have held that Title II does encompass employment discrimination.[4] Our circuit has

3. Joining Bledsoe's position are the United States Department of Justice, the National Employment Lawyers Association, and the American Civil Liberties Union, which all filed *amicus* briefs with the court.

4. *See e.g., Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *Dominguez v. City of Council Bluffs,*

(Cont'd)

not squarely addressed the issue, but two of our recent decisions have assumed or implied that Title II creates a cause of action for employment discrimination. *See Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1528-29 (11th Cir. 1997); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997). Our review of the statutory language of Title II, the Department of Justice's ("DOJ") regulations, our circuit's reference to the issue, and other courts' resolution of the issue, persuade us that Title II of the ADA does encompass public employment discrimination.

1. *The statutory language*

The ADA was implemented "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In passing the ADA, Congress recognized that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

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Iowa, 974 F.Supp. 732, 736-37 (S.D. Iowa 1997); *Hernandez v. City of Hartford*, 959 F.Supp. 125, 133 (D.Conn. 1997); *Davoll v. Webb*, 943 F.Supp. 1289, 1297 (D.Colo. 1996); *Wagner v. Texas A & M Univ.*, 939 F.Supp. 1297, 1309 (S.D.Tex. 1996); *Graboski v. Guiliani*, 937 F.Supp. 258, 267-69 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95C0143, 1996 WL 312074, at *10 (N.D.Ill., June 7, 1996); *Lundstedt v. City of Miami*, 1995 WL 852443, 5 A.D. Cases 568 (S.D.Fla. Oct. 11, 1995); *Bruton v. Southeastern Pa. Transp. Authority*, Civ.A.No. 94-CV-3111, 1994 WL 470277, at *2 (E.D.Pa. Aug. 19, 1994); *Ethridge v. State of Alabama*, 847 F.Supp. 903, 905-06 (M.D.Ala. 1993); *Eisfelder v. Michigan Dept. of Natural Resources*, 847 F.Supp. 78, 83 (W.D.Mich. 1993); *Finley v. Giacobbe*, 827 F.Supp. 215, 219-20 (S.D.N.Y. 1993); *Petersen v. University of Wis. Bd. of Regents*, 818 F.Supp. 1276, 1278 (W.D.Wis. 1993); *Bell v. Retirement Bd. of Firemen's Annuity & Benefit Fund*, 1993 WL 398612 (N.D.Ill., Oct. 6, 1993).

discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress further recognized that disabled individuals face extraordinary barriers and discrimination by outright intentional segregation and often have "no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4) and (5). Moreover, in enacting the ADA, Congress hoped to increase employment opportunities for disabled people through prevention of employment discrimination. 42 U.S.C. § 12101(a)(3), (8), and (9).

The provision of Title II allegedly violated by the District in this action provides:

> Subject to the provisions of this [title], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. "Public entity" is defined to include "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; . . . ." 42 U.S.C. § 12131(1)(A) & (B).

The statutory language used by Congress in the creation of Title II is brief. Extensive legislative commentary regarding the applicability of Title II to employment discrimination, however, is so pervasive as to belie any contention that Title II does not apply to employment actions. The Report of the United States House of Representatives Judiciary Committee stated, "[i]n the

area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation' that does not constitute an 'undue hardship.' " *See* H.R.Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. In explaining the forms of discrimination prohibited by Title II, the Report noted that:

> The Committee intends, however, that the forms of discrimination prohibited by section 202 [codified as 42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation. . . . In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations.

H.R.Rep.No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The Report further notes: "The purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that title II work in the same manner as Section 504." 1990 U.S.C.C.A.N. at 472-73.

It is significant that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act, because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination. The first Supreme Court case to consider Section 504, *Consolidated Rail v. Darrone*, 465 U.S. 624 (1984), was an employment discrimination case. The Court stated:

> Among [the] purposes [of the Rehabilitation Act] as originally stated, were to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.' 29 U.S.C. § 701(8). . . . ¶ Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under '*any* program or activity receiving Federal financial assistance.' And it is unquestionable that the section was intended to reach employment discrimination.

Id. at 626-632 (emphasis in original).

Part of the language of Title II prohibits public entities from excluding disabled individuals from "services, programs, or activities" or denying them the benefits of those services, programs, or activities. The district court in this case focused on the meaning of the words "services, programs, or activities." *Bledsoe v. Palm Beach Soil and Water Conservation Dist.*, 942 F.Supp. 1439, 1443 (S.D.Fla. 1996). The district court found that these words, "understood as a whole, focus [] on a public [] entity's outputs rather than its imputs [sic]." *Id.* The court characterized public employment as "an imput [sic]" that enables a public entity "to produce desired outputs, such as parks and schools." *Id.* at 1444. The court's analysis ignored the prohibition in the final clause of the section, which protects qualified individuals with a disability from being "subjected to discrimination by any such entity," and is not tied directly to the "services, programs, or activities" of the public entity. 42 U.S.C. § 12132. As the Second Circuit found in *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), "the

language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, . . ." Accordingly, employment coverage is clear from the language and structure of Title II.

2. *DOJ regulations*

The DOJ regulations also support the position that Title II encompasses public employment discrimination.[5]

Congress specifically provided in the ADA statute that the DOJ should write regulations implementing Title II's prohibition against discrimination. 42 U.S.C. § 12134. The House Judiciary Committee Report provided:

> Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.

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5. The district court noted its familiarity with the principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron- U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, the district court found that the plain language of the ADA, when read as a whole, does not support a cause of action for employment discrimination under Title II, and, therefore, *Chevron* deference was not applicable in this case. "[T]he Court does not believe that the conflicting legislative history sufficiently obfuscates the statute to create a vacuum of meaning for the Justice Department to fill." *Bledsoe*, 942 F.Supp. at 1449. The court concluded that when the language of the statute is plain, administrative interpretation of the statute is not entitled to deference. *Id.*

Appendix A

H.R.Rep. 101-485(III), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475.

In promulgating regulations pertinent to Title II, the Attorney General created a specific subpart in the Code of Federal Regulations ("CFR") addressing employment discrimination by public entities. These regulations state:

> (a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the Act . . . apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e. employs fifteen or more employees].
>
> (b)(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

28 C.F.R. § 35.140.

There has been no modification to the regulations promulgated by the Attorney General. Rather, in 1997, the United

States Senate unanimously gave its consent to the printing in the Congressional Record of the Board of Directors, Office of Compliance regulation adopting the Attorney General's interpretation of Title II. *See* 143 Cong. Rec. S30-31 (January 7, 1997).[6] Also, as this court has stated, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir. 1983).

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "considerable weight should be accorded to an executive department's construction of a statutory scheme," unless the regulations are "arbitrary, capricious, or manifestly contrary to the statute." The DOJ regulations provide clearly that Title II encompasses employment actions against public entities. The regulations are neither "arbitrary, capricious, [n]or manifestly contrary to the statute." *Id.* at 844. Thus, we cannot ignore the DOJ's reasonable construction of statutory language.

3. *Our court's reference to the issue*

In *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997), our court addressed the question whether a plaintiff suing under the ADA can recover for discrimination without showing that his disability was the sole cause for the adverse employment action taken against him. We answered the question in the affirmative. In discussing the issue, we noted that "[t]he stated purpose of the ADA is 'to

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6. We note, however, that these regulations do not become effective until they are approved by Congress and published in the Congressional Record. *See* 2 U.S.C.A. § 1384(d)(3).

provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " 99 F.3d at 1073, *quoting* 42 U.S.C. § 12101(b)(1). We acknowledged that Title I of the ADA applies to the private sector and provides for the elimination of disability-based discrimination. We then stated that "Title II of the ADA, *which applies to public sector employment,* contains a parallel provision." *Id.* (emphasis added). Later, we again assumed that Title II covered employment: "Title II (the public sector title)." *Id.* at 1074. Thus, without directly discussing the issue with which this court is presently faced, our court has assumed that Title II covers public employment discrimination.

Additionally, in *Holbrook v. City of Alpharetta, Ga.,* 112 F.3d 1522 (11th Cir. 1997), we addressed the question whether claims brought pursuant to Title II of the ADA involving events that occurred prior to the effective date of Title I are actionable under the ADA or the Rehabilitation, Act of 1973. In discussing this issue, we noted the language of Title II, the federal regulations promulgated pursuant to the ADA, and the Equal Employment Opportunity Commission ("EEOC") guide. 112 F.3d at 1528-29. The court then determined that "Title II thus incorporates by reference the substantive, detailed regulations prohibiting discrimination against disabled individuals contained in Title I." *Id.* at 1529. We further noted:

> The above regulations suggest that the provisions of Title II extending the protections afforded to employees in the private sector under Title I to state and local government workers became effective only when Title I went into effect. As explicitly described in the EEOC manual, the Rehabilitation Act provided a remedy for discrimination in public employment

> prior to the effective date of Tide I. We conclude that Title II of the ADA did not become effective until the date on which Title I became effective, July 26, 1992, and, prior to that date, a plaintiff's remedy for discrimination under Title II of the ADA was the Rehabilitation Act of 1973.

Id. Thus, the court implicitly determined that Title II was the "new replacement" for the Rehabilitation Act, which is what the legislative history indicates.

Although not decisions of our court, *Lundstedt v. City of Miami,* 1995 WL 852443, 5 A.D. Cases 568 (S.D.Fla. Oct. 11, 1995), and *Ethridge v. State of Alabama* 847 F.Supp. 903 (M.D.Ala. 1993), two district court decisions from within our circuit, held that Title II clearly encompasses employment discrimination by public entities. 5 A.D. Cases at 572-74; 847 F.Supp. at 906. The district court in *Ethridge* found that although a plain reading of Title II does not reveal whether it covers employment discrimination, the legislative history of and regulations promulgated under Title II make clear that the section prohibits employment discrimination by public entities on the basis of disability. The court noted that the primary purpose of Title II was to extend the reach of Section 504 of the Rehabilitation Act and that Section 504 "clearly applies to employment discrimination." 847 F.Supp. at 906, *citing Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984). The *Ethridge* court also discussed the House Report addressing Title II and the regulations implementing Title II to find that Title II covers employment discrimination.

Additionally, the *Ethridge* court noted the difference in the application of the exhaustion requirement which is mandatory in

Title I but not in Title II of the ADA.[7] The court found that although Title I requires exhaustion, Title II does not because it "incorporates the enforcement procedures of the Rehabilitation Act, . . . which do not require exhaustion of administrative remedies for non-federal employees." 847 F.Supp. at 907: "An analysis of Title II regulations further makes clear that, while resort to administrative remedies is optional, it is not required." *Id.* The court referenced the regulations, which plainly state that exhaustion is not required. *See* 28 C.F.R. § 35.172, Appendix A. We agree with this analysis and note that it is generally presumed that Congress acts intentionally and purposely where " 'it includes particular language in one section of a statute but omits it in another.' " *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

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7. The district court in this case expressed great concern in the inconsistency in the exhaustion requirement if the court found that Title II covered employment discrimination. "Acceptance of the 'no exhaustion rule,' when coupled with the slighting of Title II's plain meaning and the redundancy of Titles I and II, renders the entire statutory framework a monstrous distortion." 942 F.Supp. at 1445. The court further stated that:

> The statute the majority of the district courts (and the Justice Department) give us is completely bewildering: Both Title I and Titles II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employees to be sued for employment discrimination, but you can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times. Unwilling to impute such sheer ineptitude to Congress, the Court must part company with the current consensus.

Id. at 1445-46.

4. *Other courts' resolution of the issue*

The only other circuit to consider this issue did not really discuss it. The court allowed a plaintiff to proceed against the employer/hospital under both the Rehabilitation Act and Title II. *See Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995). The court found that both Title II and the Rehabilitation Act "prohibit discrimination against an otherwise qualified individual with a disability." *Id.* at 1264. The court noted that the parties did not dispute that the Medical System was "a 'public entity' subject to the provisions of Title II of the ADA." *Id.* n.8. Accordingly, *Doe* does not provide much guidance on the issue before us for consideration.

In *Wagner v. Texas A & M University,* 939 F.Supp. 1297 (S.D.Tex. 1996), the court determined that a tenured professor could bring a Title II claim against the University when he was not rehired to his same position following a medical disability leave. In so finding, the court found that Title II obtains its remedies from the Rehabilitation Act, which does not require exhaustion of administrative remedies before filing suit. The court relied upon *Ethridge* in making its conclusion. In its discussion, the court noted that Title II encompasses employment actions. 939 F.Supp. at 1310. The court also discussed the policy anomaly created when Title II does not require exhaustion of administrative remedies. The court stated that Title I and Title II create "separate and distinct enforceable rights." *Id.* "Title I addresses primarily the rights of disabled individuals in workplaces, while Title II addresses the rights of disabled citizens *vis-a-vis* the government." *Id.* The court stated that this inconsistency "is undesirable from a policy standpoint;" however, given the DOJ's regulatory posture, the court would "not fill the gaps in the ADA in an attempt to effectuate a purported Congressional intent that

is not entirely evident." *See also Hernandez v. City of Hartford*, 959 F.Supp. 125 (D.Conn. 1997); *Graboski v. Guiliani*, 937 F.Supp. 258 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95C0143, 1996 WL 312074 (N.D.Ill. June 7, 1996).

In *Dertz v. City of Chicago*, 912 F.Supp. 319 (N.D.Ill. 1995), the court discussed whether plaintiffs must exhaust administrative remedies prior to bringing a claim under Title II of the ADA. The plaintiffs in *Dertz* were former police officers for the City of Chicago who had been placed on medical leave and were not allowed to return to their former positions. The plaintiffs filed suit under the Rehabilitation Act and Titles I and II of the ADA. The court relied on the district court's decision in *Petersen v. Univ. of Wisconsin Bd. of Regents*, 818 F.Supp. 1276 (W.D.Wis. 1993), to find that the procedural requirements of Title I do not apply to Title II plaintiffs. *Dertz*, 912 F.Supp. at 324-25. Because the court found that the plaintiffs were not required to exhaust their administrative remedies under Title II, their actions were allowed to proceed. *Id.* at 325. *See also Finley v. Giacobbe*, 827 F.Supp. 215, 219 (S.D.N.Y. 1993)).

The District cites other district court cases which have decided this issue as did the district court in this case. *See e.g., Decker v. University of Houston*, 970 F.Supp. 575 (S.D.Tex. 1997); *Iskander v. Rodeo Sanitary District*, No. C-94-0479-SC, 1995 WL 56578 (N.D.Cal. Feb.7, 1995), *aff'd*, 121 F.3d 715 (9th Cir. 1997)(Table). However, in light of the foregoing discussion, these cases are not persuasive. Even the district judge in this case noted that he was "swimming against the current," 942 F.Supp. at 1442, in deciding that Title II does not encompass employment discrimination claims.

In conclusion, we hold that Title II does state a cause of action for employment discrimination and reverse the district court's grant of summary judgment.

REVERSED and REMANDED.

Appendix A

HILL, Senior Circuit Judge, concurring specially:

I concur with reluctance.

In Part IIA, we conclude that the meaning and consequence of an unambiguous written release are subject to dispute, variance and avoidance because we, acting *in loco parentis,* find the adult parties to the contract in need of our patronage. Although troublesome, we apparently have such a role. *See Puentes v. United Parcel Service, Inc.,* 86 F.3d 196 (11th Cir. 1996).

In Part IIB, we find that Title II of the ADA (the Act) is carefully drafted to obfuscate.[1] Congress could have said "discrimination in employment" if it had wanted to do so. Here, however, it merely forbids the exclusion of qualified individuals "from . . . participat[ing] in or be[ing] denied the benefits of the services, programs or activities of a public entity" by reason of a disability.

The district judge concluded that the Act forbids discrimination *vis-a-vis* the "output of these public entities." *See Bledsoe v. Palm Beach Soil and Water Conservation District,* 942 F.Supp. 1439 (S.D.Fla. 1996). If a constituent is angered by the district judge's interpretation or our holding today, his or her Congressperson can say "That's not what we passed. I would *never* have voted for that! That's just the work of those activist judges."

So be it. The legislative power is vested in Congress. By concluding what Congress has done, are we legislating? I hope not.

With a tip of the hat to the district judge, I reluctantly conclude that the flow of precedent is too strong for him or for us to swim upstream, and I

CONCUR.

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1. The Act resembles the campaign address of a candidate appearing before an audience that was split on a key issue. The candidate observed, "Some of my friends are in favor of this proposition; some of my friends are a against it! As for me, I stand four square behind my friends!"

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 25, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-5375

MARK BLEDSOE,

Plaintiff-Appellant,

versus

PALM BEACH COUNTY SOIL AND WATER CONSERVATION DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: DUBINA and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix B

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED OCTOBER 17, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-8360-CIV-RYSKAMP

MARK BLEDSOE,

Plaintiff,

vs.

PALM BEACH SOIL AND WATER CONSERVATION DISTRICT, et al,

Defendants.

ORDER GRANTING DEFENDANT PALM BEACH SOIL AND WATER CONSERVATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon defendant Palm Beach Soil and Water Conservation District's Motion for Summary Judgment (DE 215), filed August 1, 1996. Plaintiff has responded in opposition. On September 20, 1996, the Court heard oral argument on the motion for summary judgment, and indicated that the motion would be granted.

BACKGROUND

This case arises from plaintiff Mark Bledsoe's four-year tenure as Resource Technician for defendant Palm Beach Soil and Water Conservation District ("the District"). The position

required that Bledsoe spend a large portion of his time walking, surveying, and performing manual labor in the fields. On February 26, 1990, while performing field work at Boynton Farm, plaintiff sustained an injury to the left knee. Upon the advice of his doctors that he should refrain from excessive walking and walking on uneven terrain, plaintiff requested some form of accommodation from his supervisor. In response, the District offered plaintiff the position of Resource Conservationist, but he rejected it. In October of 1992, the District terminated him.

On July 27, 1994, plaintiff settled his workers' compensation case. The parties signed a joint settlement agreement, which contained the following provision:

> As further consideration for the aforementioned payment, the Employee/Claimant agrees and does hereby release, discharge, and surrender any and all claims, whether or not asserted against the Employer/ Carrier or Servicing Agent, or any of its officers, agents, servants, employees, directors, successors, assigns, and any other person or entity so connected to the Employer/Carrier or Servicing Agent, of any nature whatsoever . . . .

Despite signing the release, plaintiff brought this action under the American with Disabilities Act (Title II of the "ADA"), 42 U.S.C. § 12131, and the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., as amended by the Civil Rights Act of 1991, alleging that he incurred a disability for which the District provided no reasonable accommodation, and, as a result of which, the District terminated him from its employment.[1] The District has now moved

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1. The original complaint named both the District and Palm Beach County, and was brought under Title I of the ADA. The District is not covered by Title I, (Cont'd)

for summary judgment, arguing that the release bars plaintiff's action, and that his employment discrimination claim is not cognizable under Title II of the ADA.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Anderson*, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for

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(Cont'd)
because it does not have 15 or more employees. *See* 42 U.S.C. § 12111 (5)(A). The Court dismissed the County as a defendant by order dated July 27, 1995. On January 4, 1996, plaintiff filed his First Amended Complaint, now bringing an action under Title II of the ADA and the Rehabilitation Act. It is this complaint, and only the District as defendant, that are before the Court on this motion.

trial." *Celotex Corp. v. Carrett,* 477 U.S. 317, 324 (1986); *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

DISCUSSION

Defendant sets forth two reasons for the granting of summary judgment in its favor. The District argues that the release signed by plaintiff should be construed as a matter of law to prevent plaintiff from bringing this action, and that Title II of the ADA does not create a cause of action for discrimination in employment.

I. THE RELEASE

The release argument is no stranger to this Court. In its Omnibus Order of July 27, 1995, the Court considered the very same argument, but declined to hold, as a matter of law, that the release barred plaintiffs ADA and Rehabilitation Act claims. On

authority of *Barefoot v. Sears Roebuck & Co.*, 650 So. 2d 1036 (Fla. 1st DCA 1995), the Court found that the release was not so unambiguous under Florida law as to warrant dismissal of the action.

Developments since the issuance of the Court's Omnibus Order suggest that reconsideration of this issue would be appropriate. By Order dated February 18, 1995, Judge Hurley of this same district and division found that a virtually identical handicap discrimination claim was barred by the exact same release executed by Mr. Bledsoe. *FM. v. Palm Beach County*, 94-8229-CIV-HURLEY. The Eleventh Circuit affirmed without opinion, simply citing Eleventh Circuit Rule 36-1. *F.M. v. Palm Beach County*, No. 95-4465.

At oral argument, counsel for plaintiff suggested that the Eleventh Circuit's decision is not binding on this Court because the Court of Appeals failed to issue an opinion. This is not precisely what the rules say. Eleventh Circuit Rule 36-2 does say that unpublished *opinions* are not considered binding precedent, but merely persuasive authority. However, we are not dealing here with an opinion, but with what Rule 36 of the Federal Rules of Appellate Procedure denominates "an entry of judgment." Indeed, Eleventh Circuit Rule 36-1 is expressly about the entry of judgment *without opinion*. Therefore, Eleventh Circuit Rule 36-2, relating to unpublished opinions, has no effect on the question of whether entries of judgment have binding precedential value. Indeed, entries of judgment without opinion are binding. *United States v. Cagina*, 697 F.2d 915, 923 (11th Cir.) ("Affirmance without a published opinion is binding precedent for panels of the court, subject only to en banc consideration."), *cert. denied*, 464 U.S. 856 (1983). Whether this Court is "bound" by the judgment of the Eleventh Circuit or merely "persuaded," it will join Judge Hurley and the

Eleventh Circuit in finding that the release terminated plaintiffs right to sue for discrimination on the basis of handicap.[2]

II. SUITS FOR EMPLOYMENT DISCRIMINATION UNDER TITLE II OF THE ADA

Defendant also argues that a State employer does not violate Title II of the ADA by dismissing an employee on the basis of his handicap, because Title II does not relate to employment. Plaintiff responds that a majority of federal courts to consider the issue have held otherwise, and that the legislative history of Title II supports the employment discrimination cause of action. Although the Court recognizes that it may be swimming against the current, it concurs with defendant and holds that no cause of action for employment discrimination lies under Title II of the ADA. The Court notes, in passing, that resolution of this issue is not dispositive of this case because the release, discussed above, eliminates Bledsoe's claim, whether or not it is cognizable under Title II. Nonetheless, the Court feels that it would be remiss to avoid the Title II issue, which stands in sore need of careful and deliberate treatment.

1. The Split of Authority

The Eleventh Circuit has yet to pass on the question of whether Title II creates a cause of action for employment discrimination. The federal district courts, however, have split on the issue. At least one court has squarely held that Title II

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2. Plaintiff also argues that even if the County has been released from his ADA claim, the District has not. However, this Court has already found that the District, and not the County, was Mr. Bledsoe's employer. The release language explicitly refers to the "Employer," and the Court finds, as it has already found, that this refers to the District.

applies only to public services and programs, and, that it does not cover employment.[3] *See Iskander v. Rodeo Sanitary Dist.*, 1995 WL 56578 * 9 (N.D. Cal. 1995) ("Title II is inapplicable to the District's composition of employees."); *see also Dertz v. City of Chicago*, 912 F. Supp. 319, 325 (N.D. Ill. 1995) (distinguishing between suits for "employment discrimination" under Title I and for "discrimination in the administration of a public program" under Title II). The majority of the federal district courts to rule on the issue, however, have taken the view that Title II does comprehend a public entity's employment practices. *See Wagner v. Texas A&M Univ.*, 1996 WL 526272 * 6-7 (S.D. Tex. 1996); *Graboski v. Guillani*, 1996 WL 501891 * 10 (S.D.N.Y. 1996); *Silk v. City of Chicago*, 1996 WL 312074 * 10 (N.D. 111. 1996); *Bruton v. Southeastern Pennsylvania Transp. Authority*, 1994 WL 470277 * 2 (E.D. Pa. 1994); *Ethridge v. Alabama*, 847 F. Supp. 903, 906 (N.D. Ala. 1993); *Elsenfelder v. Michigan Dept. of Natural Resources*, 847 F. Supp. 78, 83 (W.D. Mich. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215, 219-20 (S.D.N.Y. 1993); *Peterson v. University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993); *Bell v. Retirement Bd. of the Firemans Annuity and Benefit Fund of Chicago*, 1993 WL 398612 * 4 (N.D. Ill. 1993). At least one federal Court of Appeals

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3. Defendant cites a number of cases in which the court seems to assume that employment discrimination actions are only cognizable under Title I. *See Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 396-97 (N.D. Iowa 1995); *Harrelson v. Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994); *Pinnock v. International House of Pancakes*, 844 F. Supp. 574, 578 n. 3 (S.D. Cal. 1993); *Kinney v. Yerusalim*, 812 F. Supp. 547, 548 (E.D. Pa.), *aff'd*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1545 (1994). These cases are helpful insofar as they reiterate what appears to be obvious from the statute — that Title I deals with employment and Title II deals with public services. However, these courts did not specifically address the issue of whether a cause of action for employment discrimination is cognizable under Title II and their precedential force is therefore somewhat weak.

has agreed. *See Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995).

Although it respects the weight of the contrary authority, the Court finds itself unable to join the courts that have held (or assumed) that a cause of action for employment discrimination lies under Title II. Many of these courts have permitted an employment discrimination suit under Title II without discussing the issue at any length (or at all). The Court suspects that the presence of the Justice Department regulation discussed below, 28 C.F.R. § 35.140, has deterred defense attorneys from raising the employment issue, so that many of the courts have permitted the employment cause of action without full attention to the problems it poses. On the other hand, the Court is unpersuaded by the few opinions squarely addressing the issue, for the reasons explained below.

2. The Text of the ADA

In analyzing the meaning of Title II the Court begins at the logical starting point, the language of the statute itself. *See Bread Pol. Action. Comm. v. FEC*, 455 U.S. 577, 580 (1982) ("statutory construction 'must begin with the language of the statute itself'. . . ."), *citing Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Title II provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (hereinafter "Title II"). Public entities include "(A) any State or local government [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131. Neither the definition section of Title II, 42 U.S.C. § 1213 1, nor the definition section for the entire ADA, 42 U.S.C. § 12102, defines the words that are crucial to this discussion: "services, programs, or activities."

The question, then, is whether the terms "services, programs, or activities" bear a plain meaning inclusive of the term "employment." As a matter of first impression, they do not. In a literalistic sense, a public entity's hiring decisions might be called "activities" of that entity (or one might say that the entity has a hiring "program"). However, the phrase "services, programs, or activities," understood as a whole, focuses on a public's entity's outputs rather than on its imputs. Other district courts have quite sensibly held that community services such as foster care programs, *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp. 303, 314 (D.N.H 1994), and bond financing for housing projects, *Independent Housing Servs. of San Francisco v. Fillmore Center Assoc., DMJM,* 840 F. Supp. 1328, 1344 (N.D. Cal. 1993), are the sort of programs covered by Title II. These agency outputs, along with parks, recreational facilities, and similar government services, lie at the center of Title II's protection. *See Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* 846 F. Supp. 986 (S.D. Fla. 1994) (park center is a service covered under Title II).

Public employment, on the other hand, is not offered as a community service. Rather, it is an imput into the public entity that permits that entity to produce desired outputs, such as parks

and schools.[4] Indeed, several of the district courts to consider the Title II employment issue have recognized that the plain language of Title II does not appear to comprehend employment, or that it is at best silent on the issue. *See Wagner*, 1996 WL 526272 * 6 ("[I]t is not apparent from the plain language of § 12132 . . . that the prohibition against discrimination by public entities includes employment discrimination."); *Ethridge*, 847 F. Supp. at 905 ("A plain reading of this section does not reveal . . . whether Title II covers 'employment' discrimination. . . ."); *Silk*, 1996 WL 312074 * 10 (An employment cause of action is not expressly stated in Title II); *Peterson*, 818 F. Supp. at 1278 ("[I]t is not obvious from the plain language of § 12132 . . . that the prohibition against discrimination by public entities includes employment discrimination."). Although these courts proceed to find other reasons to extend Title II to employment, their initial comments provide compelling evidence that this Court is not alone in finding no textual basis for the employment discrimination cause of action in Title II.

Although the Court finds that the text of Title II, standing alone, does not support an employment discrimination cause of action, the textual inquiry should not end there. In ascertaining the plain meaning of a statute, a court should look not only to the discrete portion of the statute at issue, "but to the design of the statute as a whole and to its object and policy." *McCarthy v.*

4. The Court recognizes that the Supreme Court has construed similar language in the Rehabilitation Act to include employment. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). However, the Rehabilitation Act only applied to any "program or activity," and added that these were to be construed to include "all operations" of the covered entities. 29 U.S.C. § 794 (b). The Court believes that by adding the word "service," and creating an entire new section devoted to employment, Congress meant to bifurcate the ADA into one section dealing with public and private employment relationships, and one section dealing with government services.

Bronson, 500 U.S. 136, 139 (1991), *citing Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) ("In ascertaining the meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In this case, the wholistic statutory inquiry lends further strength to the position that Title II does not cover employment.

The fundamental problem with including employment under Title II is that such a move renders Title I redundant, insofar as Title I applies to public entities. Title I applies explicitly, and exclusively, to employment: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 28 U.S.C. § 12112 (a). The term "covered entity" in Title I includes those who are "public entities" under Title II. *See* 28 U.S.C. § 12111 (2), (5) (covered entities are employers engaged in industry affecting commerce who have 15 or more employees, excluding the United States and a few others).[5] Thus, under the majority view in the district courts, public

5. In fact, the term "employer" in Title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111 (5). Logically, for a person to sue a "public entity" for employment discrimination under Title II he would have to sue his public employer. If, however, an "employer" within the meaning of the ADA is one who employs fifteen or more employees, then a suit for employment discrimination would not lie against an employer of less than fifteen employees, even under Title II. The answer to this dilemma is that the definition of "employer" in section 12111(5) only applies to Title I and that Title II does not even contain the word "employer." But this answer only further compounds the problem by making one who is not

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entities with 15 or more employees may be sued for employment discrimination under either Title I or Title II. As one court put it, this position requires that "that Title I and Title II analysis coalesce in employment discrimination matters." *Graboski*, 1996 WL 501981 * 1996.

This result is unacceptable as a matter of statutory construction. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). Although Title I is not rendered *entirely* redundant by allowing an employment cause of action under Title II it is rendered redundant insofar as it applies to public entities with 15 or more employees. Additionally, in order to accept the majority position, one must believe that Congress intended that the 15 employee threshold for employment suits should not apply to public employers. But if this was Congress's intent, it could easily have spelled this out in the definition of "covered entity" in Title I. Indeed, when Congress wanted to make exceptions to the general definition of a "covered entity" it did so. *See* 42 U.S.C. § 12111 (5) (B) ("Exceptions"). If what Congress really meant to say is that all public entities are subject to the ADA in their employment decisions, it chose an exceptionally awkward means of expressing its intention. Given the choice between accepting the awkward and redundant formulation of the entire statute, and accepting what the Court finds to be the plain meaning of Title II, it readily choses the latter.

(Cont'd)
an employer for purposes of Title I an employer for purposes of Title II. The net effect of accepting plaintiff's position in this case is that the concept of who is an employer has a different meaning under Titles I and II. Although words may mean different things in different contexts, it is strange to think that they would mean different things in two titles of the same statute, especially when the word is clearly defined in one title, and only implicit (if anything) in the other title.

Appendix C

A further textual incongruity arises from the majority position. Title I very clearly incorporates the procedures of Title VII of the Civil Rights Act of 1964, which require a plaintiff to file a charge with the Equal Opportunity Employment Commission before filing a claim in federal court. *See* 42 U.S.C. § 2000e-5(e) and (f)(1) (exhaustion requirement); 42 U.S.C. § 12117 (a) (Title I incorporation by reference). On the other hand, Title II adopts the remedies, procedures, and rights of the Rehabilitation Act of 1973, 29 U.S.C. 794 (a), which do not require exhaustion of administrative remedies. If plaintiffs may sue public entities for employment discrimination under either Title I or Title II, then they may simply sue under Title II and disregard the exhaustion requirement, even if the employer has more than 15 employees. And so the district courts in the majority have held. *See Peterson,* 818 F. Supp. at 127 8-79; *Silk*, 1996 WL 312074 * 10; *Wagner,* 1996 WL 526272 * 7, *Finley,* 827 F. Supp. at 219 n 3; *Ethridge,* 847 F. Supp. at 906-07.

Acceptance of the "no exhaustion rule," when coupled with the slighting of Title II's plain meaning and the redundancy of Titles I and II, renders the entire statutory framework a monstrous distortion. The statute Congress gave us was relatively straightforward: Title I would apply to employment; it would only bind entities employing 15 people or more; it would require exhaustion of administrative remedies. Title II would apply to government services; it would not depend on the size of the government entity; it would not require administrative remedies. The statute the majority of the district courts (and the Justice Department) give us is completely bewildering. Both Title I and Titles II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employers to be sued for employment discrimination, but you

can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times. Unwilling to impute such sheer ineptitude to Congress, the Court must part company with the current consensus.

3. The Legislative History of Title II

In perhaps the most thorough opinion accepting a cause of action for employment discrimination under Title II, the *Ethridge* court relied heavily upon the ADA's legislative history. *See* 847 F. Supp. at 905-06. Although this Court has reservations about placing heavy reliance on legislative history, particularly in the face of a relatively unambiguous statute, it nonetheless considers it wise to address the arguments raised in *Ethridge*.

First, the *Ethridge* court found it relevant that a primary purpose of Title II was to extend the reach of the Rehabilitation Act "to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance." 847 F. Supp. at 906, *citing* H. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 366. The court further noted that the Supreme Court has construed the Rehabilitation Act to cover employment discrimination. 847 F. Supp. at 906, *citing Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984). However, what is most notable about Congress's cross-reference to the Rehabilitation Act is that, in conjunction with the passage of the ADA, Congress explicitly cross-referenced the Rehabilitation Act back to *Title I* of the ADA, insofar as the Rehabilitation Act

relates to employment. "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . ." 29 U.S.C. § 794 (d). In other words, although the legislative history indicates that Congress wanted Title II to be coextensive with the Rehabilitation Act, Congress tied employment discrimination under the Rehabilitation Act to employment discrimination under *Title I* of the ADA. It would seem rather bizarre to find an employment cause of action in Title II of the ADA on the grounds that Title II is tied to the Rehabilitation Act, when the Rehabilitation Act itself ties its employment cause of action to Title I. When Congress said it wanted Title II to be coextensive with the Rehabilitation Act, it apparently did not mean to displace Title I as the ADA's vehicle for employment discrimination suits.

Second, the *Ethridge* court claims that "[t]he House Report's discussion of § 12132 further clarifies that Title II incorporates employment discrimination as proscribed in Title I and the Rehabilitation Act." 847 F. Supp. at 906. The court cites the following language from the House Committee Report:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in titles I and II, because this title essentially simply extends the anti-discrimination prohibition embodied in [the Rehabilitation Act] to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by [§ 12132] be identical to those set out in the applicable provisions of titles I and II of this legislation.

Id. at 906, *citing* H. Rep. No. 101-485 (II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 367. The continuation of the above-quoted passage offers further support for the *Ethridge* court's position: "Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing this title." H. Rep. No. 101-485 (II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 367.

From this language the Court concludes that the framers of the House Report intended to cover employment decisions under Title II. The opinion of select members of one house of Congress, however, cannot take precedence over the plain meaning of the statute. The Supreme Court has warned against giving "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." *Shannon v. United States,* 512 U.S. 573, 114 S. Ct. 2419, 2426 (1994). A court may not "give effect to [a] snippet of legislative history" when so doing would require abandoning "altogether the text of the statute as a guide in the interpretative process." *Id.* "[C]ourts have no authority to enforce [a] princip[e] gleaned solely from legislative history that has no statutory point of reference." *Id., citing International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB,* 814 F.2d 697, 712 (1987) (brackets in cited source).

The Supreme Court's admonition against using isolated snippets of legislative history as controlling guides to statutory construction proves itself wise in this case. Although the House report embraces the Title II employment discrimination cause of action, a different understanding appears from some of the debate in the Senate. Consider the following colloquy between Senators Harkin and Boschwitz:

Appendix C

Mr. Boschwitz.
I very frankly think that most Senators do not understand the implications of some of the provisions. Let me first, ask when you talk about employment, does the 15 or less employees mean full time or part time employees?

Mr. Harkin.
The term employer means a person engaged in industry effecting [sic] commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person except that for 2 years following the effective date of this title and [sic] employer means a person engaged in industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person. It is the same definition as in title 7.

Mr. Boschwitz.
But it includes part-time employees. I gather from that definition, they do not all have to be there at once is that right? Fifteen or more employees for each working day. So they may have four or five in the morning and five in the evening and six or eight in the middle of the day.

Mr. Harkin.
It says 15 or more employees for each working day.

Appendix C

Mr. Boschwitz.
But do they have to all be there at one time, I say to the Senator. Your staff is nodding their heads yes. Does that mean they will have to all be there at one time?

Mr. Harkin.
Well, if the Senator would just withhold for just a moment I will find out the exact answer. This is the same language that has been used in Title 7 for 25 years. So there must not be too much of a problem with it. If the Senator would just hold for a second we will find out if there has been any problem with it for 25 years.

Mr. Boschwitz.
I will ask another question.

Mr. Harkin.
Do you have another question?

Mr. Boschwitz.
I do. **I ask whether or not it would apply to townships, municipal governments, and counties and so forth?**

Mr. Harkin.
Yes, it does affect local governments.

Mr. Boschwitz.
It does effect all local governments?

Mr. Harkin.
Yes.

> Mr. Boschwitz.
> So even some people who are paid just a few dollars by a local government are included? This may well include even some very small localities? . . . .

135 Cong. Rec. S10734-02, *S10750 (Sept 7,1989) (emphasis supplied).

Additional evidence of the conflicting "intent of Congress" appears in the statements of Representative Miller, speaking in support of the ADA *as a whole.*

> This legislation will prohibit discrimination against individuals with disabilities in employment, programs or activities of a State or local government, in public accommodations, transportation, and telecommunications. It does so by providing protections that are consistent with other Federal civil rights laws long on the books. Its protections are far-reaching, yet the demands in [sic] places on compliance are modest. It initially exempts employers with fewer than 25 employees for the first 2 years, and therefore, employers with fewer than 15 employees . . . .

136 Cong. Rec. H2421-02, *H2448 (May 17, 1990) (statement of Rep. Miller).

From these admittedly ambiguous snippets of legislative history, it seems that at least some members of Congress understood the fifteen employee threshold of Title I to apply to state and local government, as well as to private employers. Certainly, these passages do not permit the Court to impute to

Congress an intention to make Title I (including its fifteen employee threshold and exhaustion of administrative remedies requirement) the exclusive vehicle for employment discrimination actions under the ADA. However, they sap the strength of the House Reports observation that employment actions are cognizable under Title II. At the very least, it must be, said that while some members of Congress understood Title II to comprehend employment, not all members of Congress shared this understanding. Even assuming that the members of Congress not affirmatively espousing the position of the House Report did not have a sufficiently clear understanding of the issue to express a negative opinion on that position, their assumption that the fifteen employee threshold applies to state and local government prevents the House Report from counting as the definitive "intent of Congress," if any such creature exists.

If this were a civil trial, in which the intent of Congress as manifested in the legislative history had to be proven by a preponderance of the evidence, the Court might find in favor of the Title II employment cause of action position. This is not such a case. The text of the statute is clear, and the legislative history conflicting. Having "no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point," *Shannon*, 114 S. Ct. at 2426 (citation omitted), the Court will not accord controlling weight to the House Report.

4. Deference to the Justice Department's Regulation

The difficulty with this Court's rejection of the Title II employment cause of action does not end with the legislative history. Acting pursuant to 42 U.S.C. section 12134, the Attorney General has promulgated regulations to effectuate subtitle A of Title II. These regulations include a prohibition against employment discrimination.

Appendix C

§ 35.140 Employment discrimination prohibited

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of title I of the Act, as established, by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

28 C.F.R. § 35.140.

The Court is, of course, familiar with the principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). It is also true, however, that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n. 9. The Supreme Court has not hesitated to override regulations promulgated by administrative agencies when traditional tools of statutory construction render a result contrary to the agency's position. *See I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 446 (1987); *Dole v. United Steelworkers of America,* 494 U.S. 26, 42 (1990); *see also Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of

the statute, and when the statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished."); *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 518 U.S. 218, 114 S. Ct. 2223, 2231 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear . . . .").

The Court has previously remarked that the plain language of the ADA, when read as a whole, does not support a cause of action for employment discrimination under Title II. *Chevron* deference notwithstanding, the Court does not believe that the conflicting legislative history sufficiently obfuscates the statute to create a vacuum of meaning for the Justice Department to fill. When the language of a statute is plain, administrative interpretation of the statute is not entitled to deference. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). The meaning of Titles I and II of the ADA is plain enough as to the employment issue, and the Justice Department's regulation, therefore, is overruled.

5. Final Comments on the ADA Issues

The Court recognizes that it is taking an unusual step in parting with the overwhelming majority of the district courts (and at least one circuit court), in declining to follow the clear statement in the House Report, and in overruling a Justice Department regulation. This is, however, a case in which the plain meaning of the statute enacted by Congress, and not the intentions of individual members of that body or the judgment of lawyers at the Justice Department, must control. It seems to the Court that the process of statutory construction increasingly is moving in a direction in which secondary or tertiary means of ascertaining the meaning of a statute are replacing the traditional judicial

enterprise of reading the plain language of the statute as a whole. This has the effect of delegating ultimate lawmaking power to congressional committees (or subcommittees) and unelected bureaucrats. With all due respect to the members of congressional committees and the employees of administrative agencies, the Court believes that our republican form of government is best served when the courts apply the law as written, not as intended by some, or delegated to others.

CONCLUSION

The Court finds that plaintiff has contractually released defendant Palm Beach Soil and Water Preservation District from the claims at issue in this case. Additionally, the Court finds that plaintiff has not stated a claim under Title II of the ADA. Wherefore, it is

ORDERED AND ADJUDGED the defendant Palm Beach Soil and Water Conservation District's Motion for Summary Judgment (DE 215) be, and the-same is hereby GRANTED. An order granting final summary judgment in favor of defendant shall be separately entered.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 17 day of October, 1996.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Denise Bleau, Esq.
Isidro Garcia, Esq.
Richard McDuff, Esq.

APPENDIX D — PERTINENT PROVISIONS OF TITLES I AND II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. §§ 12111, *et seq.*, AND 12131, *et seq.*

TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12111, *et seq.*

§ 12111. Definitions

As used in this subchapter:

* * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day, and each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a persons engaged in an industry affecting commerce

who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * *

Appendix D

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12131, *et seq.*

§ 12131. Definitions

As used in this subchapter:

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Appendix D

§ 12132. Discrimination

Subject to the provisions of the subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

No. 97-2054

FILED
AUG 17 1998
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

PALM BEACH SOIL AND
WATER CONSERVATION DISTRICT,
a political subdivision of the State of Florida,

Petitioner,

vs.

MARK BLEDSOE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

ISIDRO M. GARCIA, Esquire
Counsel of Record
GARCIA, ELKINS & CARBONELL, P.A.
105 South Narcissus Avenue
Suite 802, The Citizens Building
West Palm Beach, FL 33401
(561) 832-8033

Counsel for Respondent
Mark Bledsoe

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This petition seeks review of an issue that every federal appellate court, and the overwhelming majority of district courts, have answered resoundingly in accordance with the unanimous disposition rendered by the Eleventh Circuit. The challenged holding is that Title II of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, *et seq.*, encompasses employment discrimination.

Petitioner is seeking to have this Court reverse this nearly universal chorus of agreement so construing the ADA and would instead have this Court usurp the legislative function from Congress, as the trial court did here, and hold that Title II of the ADA applies only to "services," despite the fact that the plain language of the statute is not so constricted, and prohibits discrimination against qualified individuals with a disability in "services, *programs or activities . . . or* [that said qualified individuals] be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added).

Certainly, the provisions of Title II cited above, are reasonably construed to encompass "employment" since "employment" is undoubtedly one of the "services, programs or activities" of government, as previously construed by this Court for a substantially similar statute. Further, the language of the statute which prohibits, more generally, "discrimination by any such entity" is sufficiently broad to encompass employment discrimination also. The legislative history also supports this construction, as well as the legislatively mandated regulations promulgated by the executive branch through the Department of Justice.

There is no reason why this Honorable Court should review the Eleventh Circuit's decision, which, in view of the above considerations, is eminently correct. Moreover, review at this time would be premature because, in the extremely unlikely event that the Court *were* to agree with the petitioner's position, that would not dispose of the yet to be set trial, since respondent, Mark Bledsoe (hereinafter "Mr. Bledsoe" or "plaintiff"), has a claim under the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter the "Rehabilitation Act"), which claim has been revived by the Eleventh Circuit's decision. This aspect of the decision has not been appealed and is now the law of the case.[1]

Mr. Bledsoe filed suit on June 24, 1994 against appellees Palm Beach Soil and Water Conservation District and Palm Beach County (hereinafter "District" and "County"), alleging violations of his rights under Title I of the ADA and the Rehabilitation Act. In essence, Mr. Bledsoe alleged that he had a disability within the meaning of the law, that the defendants, as his employers, failed to accommodate his disability, and that he was discharged as a result of this disability.

Litigation followed, and for purposes herein, the following summary of the case will suffice. The County argued that it was not Mr. Bledsoe's "employer" for purposes of the claims herein *and* that it had been

---

[1] The trial court, as developed *infra*, had disposed of the Rehabilitation Act claim by holding that a worker's compensation settlement agreement, for a knee injury sustained by Mr. Bledsoe years before his termination, served as a bar to all of his claims. Relying on binding precedent from the Eleventh Circuit which the trial court declined to adhere to, the trial court's disposition of this issue was reversed, and review has not been sought by petitioner.

released from the claims here by virtue of Mr. Bledsoe's partial release of a wholly unrelated[2] claim for worker's compensation benefits. After considering the parties' cross-motions for summary judgment on the issues of the "employer-employee" relationship and the effect of the worker's compensation release on Mr. Bledsoe's claims under federal discrimination laws, the trial court issued an omnibus order, where it determined: 1. The County was *not* Mr. Bledsoe's employer, and therefore summary judgment would be entered for it on all claims; [but] 2. The worker's compensation settlement agreement did *not* release the County from the claims herein; 3. Mr. Bledsoe was disabled and terminated by the District as a direct result of his disability; 4. Issues of fact precluded summary judgment as to whether plaintiff was an "otherwise qualified" disabled individual, as to whether the District was subject to coverage under the Rehabilitation Act, as to whether the District failed to reasonably accommodate the plaintiff,[3] and as to whether a reasonable accommodation would constitute an undue hardship for the District.

---

[2] Mr. Bledsoe sustained a work related injury to his left knee on February 26, 1990 and developed a condition know as *osteochondritis desicans*, which he contended constituted a disability within the meaning of the law. The trial court, in its first summary judgment order, relying on the testimony of Dr. Craig Lichtblau that Mr. Bledsoe had a permanent impairment, found that he was in fact disabled within the meaning of the law. Although the injury did directly lead to the disability, the claim for the injury was wholly separate and apart from the claim for a failure to accommodate and the termination.

[3] The petition represents that the District attempted to accommodate Mr. Bledsoe's disability by offering him the position of Resource Conservationist, and further, by offering

Thereafter, the County filed various motions for sanctions, attorney's fees and costs, against both Mr. Bledsoe and undersigned counsel. The trial court orally announced at a hearing held on said motions that it would award attorney's fees and costs against Mr. Bledsoe, under the standard set forth in *Christianburg Garment Company v. EEOC*, 434 U.S. 412 (1978), and, further announced it would hold a separate evidentiary hearing on plaintiff's counsel's liability under Rule 11, Federal Rules of Civil Procedure.[4] An evidentiary hearing was held on plaintiff's counsel's liability under Rule 11 on October 15, 1996. The parties resolved all of those issues and no aspect of this appeal applies to the County, the plaintiff having agreed to waive his right to appeal the trial court's disposition that the County was not his employer as a part of resolving the County's various motions for fees, costs and sanctions. As a result of the parties' resolution of these issues, the trial court denied

---

him the opportunity to write his own job description. That is not accurate, otherwise this case would not be in court and the parties would have lived happily ever after. Mr. Bledsoe was terminated when he told his employer he would need surgery on his knee; he had earlier declined a transfer to another position because it would require *more*, not less, physical and emotional exertion on his part. Accordingly, the offer of the transfer, although not germane to the issues raised in appeal, is not accurately represented in the petition.

[4] This order was never reduced to writing but the purported basis of it was that Mr. Bledsoe's claim that the County was also his employer was incorrect. This extraordinarily harsh sanction was going to be imposed despite the fact that the County, in its own internal documents, admitted that *it was* Mr. Bledsoe's employer, and that the District was a department of the County.

as moot the various motions for attorney's fees, sanctions and costs filed by the County against Mr. Bledsoe and his counsel.

Following the dismissal of the County, litigation continued between the District and Mr. Bledsoe. Since the County was no longer a party to the case, and since it was undisputed that the District, by itself, did not have the requisite number of employees to effect coverage under Title I of the ADA, plaintiff sought leave to amend the complaint to bring a claim under Title II,[5] which request the trial court granted. Thereafter, plaintiff proceeded on his First Amended Complaint. The District answered and set forth various affirmative defenses.

The District then filed a motion for summary judgment, in which it contended that it was not a recipient of federal financial assistance and thus not subject to the Rehabilitation Act. The District withdrew the motion when plaintiff learned that the evidence which the District had submitted to the trial court was false. In contrast to the treatment afforded the plaintiff and his counsel over the claim that the County was also the plaintiff's employer, the trial court denied plaintiff's motion for sanctions against the District despite the false evidence, and even chided plaintiff's counsel for exposing the issue to the court.[6]

---

[5] By motion filed February 16, 1995, long before disposition of the first summary judgment order, plaintiff sought to amend, by interlineation, his claim under Title I of the ADA to also state a claim under Title II. The trial court denied the motion.

[6] Plaintiff filed a motion to strike the District's factually groundless motion, and pointed out to the trial court that the

Thereafter the District moved for summary judgment on two separate grounds, one of which had previously been explicitly rejected by the trial court when the County asserted the argument: first, the District argued that it was not liable under Title II of the ADA because said law did not apply to discrimination in employment; second, the District said it was released from the federal claims here by virtue of plaintiff having resolved a portion of his worker's compensation claims against the County. Plaintiff opposed this motion by memorandum, pointing out to the trial court that it had previously rejected the very argument advanced by the District when it had been raised by the actual party to the worker's compensation settlement, the County; secondly, the plaintiff argued that the Department of Justice (D.O.J.) administrative regulations implementing Title II of the ADA, as well as the overwhelming weight of legislative history, and the emerging case law around the country, repudiated the District's argument that Title II did not include a prohibition against employment discrimination.

The trial court entered an order that receded from its earlier disposition of the release issue and also held that Title II did not cover employment discrimination. The trial court thereafter entered judgment in favor of the

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evidence submitted by the District was false. The trial court denied the motion as moot. Plaintiff moved for reconsideration of that part of the order denying plaintiff costs and fees as a sanction against the District forcing the plaintiff to take two (2) depositions that exposed that the motion should have never been filed since it was based on facts that were not true. The trial court declined to consider same on the merits because the District's motion for summary judgment on the federal funding issue had been withdrawn.

District on both claims. Plaintiff filed a motion for rehearing, which the trial court denied summarily one (1) day after the filing of the motion.

Thereafter, plaintiff filed a timely notice of appeal to the Eleventh Circuit, which reversed the trial court on both issues. *Bledsoe v. Palm Beach County Soil and Water Conservation District*, 133 F.3d 816 (11th Cir. 1998). Petitioner's motion for rehearing, and suggestion of rehearing *en banc*, were denied by the Eleventh Circuit. Petitioner then sought review in this Court by filing a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit correctly held that Title II of the ADA protects qualified individuals with disabilities from discrimination by public employers. The Eleventh Circuit reached this conclusion by examining the specific language of the ADA, Congress' intent in enacting the law, as well as regulations enacted by the Department of Justice, which reflect the Executive Branch's view of the law.

Congress clearly intended the ADA to prohibit employment discrimination by all employers against the disabled, excepting only federal employees that already had this protection under the Rehabilitation Act of 1973. *See* 42 U.S.C. § 12111(5)(B); 29 U.S.C. § 791. The purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress further recognized that [society has] "tended to isolate and segregate individuals with

disabilities and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2).

By setting forth its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities, 42 U.S.C. § 12101(b), Congress hoped to ensure equality of opportunity for all qualified disabled people, full participation, economic self-sufficiency and the elimination of "billions of dollars in unnecessary expenses resulting from dependency and non-productivity." 42 U.S.C. § 12101(a)(8), (9). The decision of the Eleventh Circuit recognizing that Title II of the ADA protects public sector employees from discrimination by public sector employers is entirely consistent with the language of the statute, Congress' intent and with the decisions of the overwhelming majority of courts that have considered this issue.[7]

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[7] *See Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264-1265 (4th Cir. 1995); *Davoli v. Webb*, 943 F. Supp. 1289, 1297 (D. Colo. 1996); *Wagner v. Texas A&M Univ.*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996); *Graobski v. Guiliani*, 937 F. Supp. 258, 268-69 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95-C-0143, 1996 WL 312074, *10 (N.D. Ill. June 7, 1996); *Bruton v. Southeastern Pa. Transp. Auth.*, No. 94-CV-3111, 1994 WL 470277, *2 (E.D. Pa. Aug. 19, 1994); *Ethridge v. Alabama*, 847 F.Supp. 903, 906 (M.D. Ala. 1993), and 860 F. Supp. 808, 812 (M.D. Ala. 1994); *Eisfelder v. Michigan Dep't of Natural Resources*, 847 F. Supp. 78, 83 (W.D. Mich. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215, 219-20 n.3 (S.D.N.Y. 1993), *aff'd on other grounds*, 79 F.3d 1285 (2d Cir. 1998);

A. The plain language of Title II of the ADA encompasses employment discrimination.

The plain language of Title II illustrates that Congress intended Title II to preclude employment discrimination. "In determining the scope of a statute, we first look to its language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (citation omitted). *See also Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

After construing Title II of the ADA as protecting individuals with disabilities from employment discrimination in *dicta* found in several cases,[8] the Eleventh Circuit squarely held in this case that the express language of Title II protects public sector employees from discrimination on the basis of disability. Title II of the ADA provides, in relevant part:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason

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Petersen v. University of Wis. Bd. of Regents, 818 F.Supp. 1276, 1278 (W.D. Wis. 1993); *Bell v. Retirement Bd. of Firemen's Annuity & Benefit Fund of Chicago*, No. 92-C-5197, 1993 WL 398612, *4 (N.D. Ill. Oct. 6, 1993). *But see Iskander v. Rodeo Sanitary Dist.*, No. 94-C-0479, 1995 WL 5678, *9 (N.D. Cal. Feb 7, 1995); *Dertz v. City of Chicago*, 912 F. Supp. 319, 325 (N.D. Ill. 1995).

[8] *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1528-29 (11th Cir. 1997); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996).

> of such disability, be excluded from participation in or be denied the benefits of the *services, programs, or activities* of a public entity, *or be subjected to discrimination by any such entity.*

42 U.S.C. § 12132 (emphasis added). Certainly, the language which is emphasized above in the statute can reasonably be understood to encompass employment discrimination.

As Justice Scalia recently noted for a unanimous Court: " . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, ___U.S.___, 118 S. Ct. 998, 1002 (1998). In other words, under a democratic form of government, it is not the function of courts to usurp legislative authority, but to carry out and enforce the legislative mandate, even when the expression of that mandate leads to prohibition of an evil that may or may not have been contemplated at the time of enactment of the law.[9]

The Eleventh Circuit's interpretation of the language of Title II is consistent with interpretations given by this Court to other similarly worded federal anti-discrimination provisions, namely, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. § 901(a) of Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in,

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[9] However, as developed *infra*, the legislative history leaves little doubt that Congress intended Title II to encompass employment discrimination.

> be denied the benefits of, or be subject to discrimination under any education *program or activity* receiving Federal financial assistance.

20 U.S.C. § 1681 (emphasis added). In construing this similarly worded statute, this Court in the case of *North Haven Bd. of Education v. Bell*, 456 U.S. 512 (1982), held that the language of Title IX provides protection against employment discrimination. The language of the Education Amendments prohibiting discrimination in any "education **program or activity**" closely parallels the language of Title II of the ADA prohibiting discrimination in any "**services, programs, or activities** of a public entity" (emphasis added). The Eleventh Circuit's opinion in this case correctly interpreted the language of Title II as prohibiting discrimination in all of its forms, including employment. Such a conclusion is reasonable in light of the *North Haven* decision, which petitioner conveniently omits from its petition. This omission, it is respectfully submitted, speaks volumes about the credibility of the argument raised by petitioner.

Part of the language of Title II of the ADA prohibits public entities from excluding disabled individuals from "services, programs or activities" or denying them the benefits of those services, programs, or activities. The trial court in this case focused on the meaning of the words "services, programs, or activities." *Bledsoe v. Palm Beach Soil and Water Conservation District*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996). It indicated it found support for its conclusion that the term "services, programs, or activities" was not intended to include employment claims. However, this issue does not necessarily turn

solely on the meaning of "services, programs, or activities," but rather on the rest of the prohibition; "*or* be subjected to discrimination by any such entity." At least one court has focused on the disjunctive "or" to reject a public entity's argument that discrimination that did not involve "services, programs or activities" was permissible under the ADA. *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996). In *Crowder*, the Ninth Circuit rejected the district court's dismissal of plaintiff's challenge to Hawaii's quarantine requirement because it was "not a service or benefit provided by the state," stating:

> The flaw in this analysis is the assumption that no violation of the ADA takes place unless a service or benefit of the state is provided in a manner that discriminates against disabled individuals. This is simply not so. Section 12132 of the ADA precludes (1) exclusion from/denial of benefits of public services, as well as (2) discrimination by a public entity. Due to the insertion of "or" between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude congress intended to prohibit two different phenomena. Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.

Id.

The trial court's disposition, correctly rejected by the Eleventh Circuit, would do violence to this Court's decision in *North Haven*, as discussed *supra*. It would also ignore the general prohibition against discrimination set

forth in the disjunctive, which as recognized by the Ninth Circuit in *Crowder,* creates a separate set of prohibitions. The plain language of Title II therefore supports the holding that employment discrimination is within the boundaries of the evils Congress sought to outlaw.

B. The legislative history demonstrates that Congress intended to prohibit employment discrimination under Title II of the ADA.

Not only does the plain language of Title II lead to this conclusion, but the legislative history also clearly indicates Congress' intent that Title II serve as a prohibition against employment discrimination. Petitioner's suggested interpretation is directly contrary to Congress' expressed intent.

The close relationship between Section 504 of the Rehabilitation Act of 1973 and the enactment Title II of the ADA is evident from the ADA's legislative history. The express and repeated references to provisions of Section 504 of the Rehabilitation Act of 1973 in the ADA's legislative history are crucial to understanding Congress' intent in regard to Title II. The first sentence of the Section by Section Analysis regarding Section 202 of the ADA's prohibition on discrimination reads: "Title II extends the protection of Section 504 of the Rehabilitation Act to cover all programs of state and local governments, regardless of the receipt of Federal financial assistance." H. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), reported in U.S.C.C.A.N 472. The legislative history further indicates "The purpose of Title II is to continue to

break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that Title II work in the same manner as Section 504." *Id.* at 473.

This Court held in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), that a primary purpose of Section 504 of the Rehabilitation Act was to afford those with disabilities protection against employment discrimination, even though the statute did not expressly mention discrimination in the employment context. Although an examination of the legislative history was not imperative to the Eleventh Circuit's holding, the legislative history lends support to its holding.

The fact that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act is significant because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination. The first case in which this Court considered Section 504, *Consolidated Rail v. Darrone, supra*, was an employment discrimination case, continued after the plaintiff's death by his estate.[10]

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[10] The Court was asked to address the scope of the private right of action to enforce Section 504 of the Rehabilitation Act of 1973 prohibiting discrimination against the handicapped by federal grant recipients. The Court announced "Among its purposes [the Rehabilitation Act], as originally stated, were to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.' 29 U.S.C. Sec. 701(8)," *Id.* The Court went on to say "It is clear Section 504 itself contains no

The statutory language used by Congress in the creation of Title II is brief. However, extensive legislative commentary regarding the applicability of Title II to employment discrimination is so pervasive as to belie any contention that Title II does not apply to employment actions. The Report of the House Judiciary Committee stated that "In the area of employment, Title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation'[11] that does not constitute an 'undue hardship.' "[12] The Report goes on to state that reasonable accommodation is "central to the non-discrimination mandate," even though it may require "substantial amounts of time and money to keep handicapped employees on the payroll." *Id.* at 51, *quoting Rhone v. U.S. Department of the Army*, 665 F. Supp. 734, 745, n.19 (E.D.Mo. 1987). The Report discusses the concept of undue hardship, advising that "a number of factors, including the size and budget of *the employer* are set forth as factors to be considered." *Id.* (emphasis added). It is

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such limitation [limiting an action to employers receiving Federal funds whose primary objective is to provide employment]. Section 504 neither refers explicitly to Section 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under *'any* program or activity receiving Federal financial assistance.' " And it is unquestionable that the section was intended to reach employment discrimination. *Id.* at 632.

[11] Whether or not appellee breached that duty of reasonable accommodation is in fact the issue raised in this case.

[12] H. Rep. 101-485(II), 101st Cong., 2d Sess. 84 (1990) at p. 50, reprinted in 1990 U.S.C.C.A.N. 445, 473.

impossible to reconcile these specific legislative concerns with the trial court's stingy construction of a law that Congress passed with the notion of invoking the " . . . sweep of congressional authority . . . in order to address major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

In explaining the forms of discrimination prohibited by Title II, the Report noted that:

> The Committee intends, however, that the forms of discrimination prohibited by Section 202 [codified as 42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and II of this legislation . . . In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous Section 504 regulations.

Id. at p. 367.

The repeated invocations of Section 504 of the Rehabilitation Act of 1973 throughout the legislative history are crucial to understanding the intent of Congress with regard to Title II. Since the legislative history is in accord with the statutory language, the Eleventh Circuit was correct to hold that Title II encompasses employment discrimination.

C. The legislatively mandated executive branch regulations also support the holding that Title II encompasses employment discrimination.

In its opinion, the Eleventh Circuit also relied upon regulations promulgated by the Attorney General mandated by Title II. Title II required the Attorney General to

implement regulations giving effect to the anti-discrimination provisions of Title II:

> Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.

H. Rep. 191-485(II), 101st Cong., 2d Sess. 84 (1990) at p. 50, reprinted in 1990 U.S.C.C.A.N. 445, 475. Pursuant to Congress' direction, the Attorney General promulgated regulations addressing employment discrimination by public entities:

> (a) No qualified individual with a disability shall, on the basis of disability be subjected to discrimination in employment under any service, program or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the act. . . . apply to employment in any service program or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e., employs fifteen or more employees].
>
> (b)(2) For the purposes of this part, the requirements of Section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 C.F.R. Part 41, as those requirements pertain to employment, apply to employment in any service, program or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of Title I.

28 C.F.R. 35.140.

As with all properly enacted executive agency regulations, the DOJ's regulations should be given great weight. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. [Unless those regulations are] arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). These regulations were enacted pursuant to specific direction by Congress. They are consistent with the specific language of the statute, legislative history related to the ADA, as well as the overall policy underlying the ADA.

Moreover, these regulations have been in effect now for many years, and Congress has taken no action to effect a legislative override of the regulations, which it certainly could do, if it so chose. As the Eleventh Circuit noted in a prior decision, which it reiterated in this case: " '[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change its meaning.' " *Bledsoe, supra*, 133 F. 3d at 822 (Citing to *Florida National Guard v. Federal labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir. 1983)).

Petitioner argues that application of Title II to the employment context will lead to either redundant or inconsistent results. Petitioner asserts that because Title II of the ADA does not require exhaustion of administrative remedies and does not have a threshold requirement that the employer have a certain amount of employees, it could not have been intended to apply to employment discrimination. Each of these arguments is misplaced. The Attorney General concluded while promulgating the

above referenced regulations related to Title II that "Congress intended to cover the employment practices of all public entities." 28 C.F.R. Pt. 35, App. A, Subpt. C. For that reason and analogous to Section 504 of the Rehabilitation Act, Title II does not require the public employer to have a threshold number of employees.

Additionally, it is not problematic that Title II does not require exhaustion of administrative remedies as a prerequisite to relief. "It is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action under Section 202." H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. at 98 (1990). See also S. Rep. No. 116, 101st Cong., 1st Sess. at 57-58 (1989).

Finally, petitioner complains that under Title II, the damages it is exposed to are not limited by a statutory cap that is in place under Title I. This is true, but it is not a reason to invalidate the law or deem it inapplicable to employment. Public sector employers who are recipients of federal funding are also subject to damage awards that are cap-less under the Rehabilitation Act; this is so whether the employer has one (1) or 1,000 employees. There are different remedies provided for victims of age discrimination, and for victims of other forms of discrimination, such as race, sex, national origin, religion, color and disability. Compare 29 U.S.C. § 626(c), which incorporates the remedies of the Fair Labor Standards Act, 29 U.S.C. § 216(b), with the remedies found for Title VII at 42 U.S.C. § 1981a.

Petitioner seems to be under the impression that for Congress to validly enact a law, it must do so following a

principle of perfect symmetry, at least when it comes to capping damages. But that is not so. In fact, legislative power may treat different evils with different remedies. There are no legislatively mandated caps for claims of race discrimination under 42 U.S.C. § 1981, or for claims brought under 42 U.S.C. § 1983. Does that mean that those laws are invalid because in Title VII Congress has capped compensatory and punitive damages, which caps are driven by the number of persons employed? Of course not. Making these decisions is a legislative function, and courts, under our system of government, are not authorized to impose a more exacting symmetry, as petitioner would urge this Court to do. Invalidating a statute, or, as the trial court did here, excepting a class of employers from its reach, because the statute is not perfectly symmetrical on the issue of damages, constitutes a usurpation of legislative authority. Under our representative form of democracy, only our elected representatives may legislate. The Eleventh Circuit properly repudiated the trial court's effort to legislate from the bench, as must this Court.

CONCLUSION

There is no reason for this Court to review the issue raised by the petitioner. The great tide of judicial authority is against the petitioner; the legislative history and executive branch regulations are against the petitioner. And, perhaps most importantly, Congress, after years of living with the judicial gloss given to Title II of the ADA and the Department of Justice's comprehensive regulations, has not seen a reason to correct these constructions.

Congress has certainly done so in the past, as in passage of the Civil Rights Act of 1991, and may do so in the future. But it is not for this Court to truncate the laws of Congress, as the trial court did here without justification. The petition for certiorari should be denied.

Dated: August 17, 1998

Respectfully submitted,

ISIDRO M. GARCIA, ESQUIRE
GARCIA, ELKINS & CARBONELL, P.A.
105 South Narcissus Avenue
Suite 802, The Citizens Building
West Palm Beach, FL 33401
(561) 832-8033
(561) 832-7137 (telecopier)
Florida Bar No. 437883

Counsel for Respondent